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No. 75-1240

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In the Supreme Court of the United States

OCTOBER TERM, 1975

TOMAS RODRIGUEZ and ANGEL MANUEL SANTANA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

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I.

INTRODUCTION

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

May it please your Honors:

II.

JURISDICTION

This Petition for Rehearing from the denial of a Petition for Certiorari is filed pursuant to United States Su-

preme Court Rules 58(1)(2). The Petition for a writ of certiorari was denied on May 24, 1976. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall would grant certiorari.

This petition is timely filed in that it is clearly filed within the 25 days alloted as per Supreme Court Rule 58(1).

III.

REASONS IN SUPPORT OF REHEARING

(a) The Government's memorandum in opposition was received by counsel on or about May 15, 1976. Thus, the time as between reply and this court's consideration of this petition was less than 9 days and did not allow petitioner's counsel to file a response.

(b) A response is absolutely necessary in this case.

(c) The Solicitor General's (memorandum in opposition) is less than accurate as it relates to the factual background of this litigation. *Seriatim* we shall disclose the inadvertent mistakes in the Solicitor General's pleading:

(1) On pages 2 and 3 the Solicitor General indicates that the Government informed the court that an individual allegedly supplying heroin to the petitioners herein had died (p. 2) and that the petitioners would move to withdraw their plea of guilty were the Government unable to produce the informer (p. 3). THESE FACTS ARE INCORRECT. The petitioners advised the court that Seranno (a/k/a "El Lobo") was deceased and this information came to the Court's attention by virtue of a written pleading to vacate the guilty pleas filed on April 24, 1976 (R.

12).[1] Further THE WRITTEN MOTION TO VACATE THE GUILTY PLEAS long preceded any evidentiary hearing(s) in this case (*contra,* Solicitor General's Pleading p. 3).

(2) Most prominent in the inadvertent error(s) in the pleadings submitted by the Solicitor General is the following:

> "After the hearing, petitioners each moved to withdraw his guilty plea" (Sol. Gen. Mem. pg. 3).

EACH PETITIONER HAD MOVED, IN WRITING, TO WITHDRAW THEIR GUILTY PLEA ON OR ABOUT APRIL 24, 1975 (R. 12). The hearing(s) were conducted on May 6 and 8, 1975. A second WRITTEN MOTION TO VACATE THE GUILTY PLEAS WERE ON FILE PRIOR TO MAY 14, 1975 (R. 16, 17).[2] Thus, the suggestion by the Solicitor General, *sub silentio,* that the motions to vacate these guilty pleas were "an afterthought" was less than appropriate (or accurate).

(3) The Solicitor's Memorandum suggests to this court that our claim of:

> "A conflict among the circuits does not withstand scrutiny" (Sol. Gen. Mem. pg. 5, n. 4).

This is a most inaccurate and unfortunate statement. In 6 ALR Fed. pp. 665 to 706 (1975) a litany of Rule 32(d)

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[1] Petitioner's counsel had requested the Clerk of the Circuit Court of Appeals for the 7th Circuit to transmit "the entire record" to the Clerk of this Court.

[2] The Solicitor General commences his presentation to this court by suggesting total "Rule 11 compliance" in the district court. The petitioners expressly declined to seek relief based on any "Rule 11" defect or deficiency (Pet. for Cert., pg. 4; n.5).

cases are collected in an exhaustive annotation.[3] This annotation compiles a galaxy of Rule 32(d) cases which more than support our suggestion that there is an abundant "split" in the several circuits regarding presentence withdrawal of a guilty plea, PARTICULARLY WHERE THERE EXISTS NO PREJUDICE TO THE GOVERNMENT (emphasis supplied).

(4) The Solicitor General considers the possibility of prejudice to the prosecution's case because of the death of one of the parties to the transaction in this case (Sol. Gen. Mem. pg. 4, n. 3). Unfortunately reference is (was) nowise made, either in the District Court, or the Court of Appeals, on the subject of "even possible prejudice to the Government in this case". The Government, in both Courts below, eschewed any suggested reference to even possible prejudice where the guilty pleas are withdrawn.[4]

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[3] The "split" in Circuits is fully explored in this annotation and among the discussed cases are:

Second Circuit—*United States* v. *Rogers* (1968, DC Conn) 289 FSupp 726.

Third Circuit—*United States* v. *Stayton* (1969, CA3 Pa) 408 F2d 559.

United States v. *Boyance* (1966, DC Pa) 258 F Supp 935; *United States* v. *Fina* (1968, DC Pa) 289 F Supp 288.

Fifth Circuit—*United States* v. *Tivis* (1969, DC Tex) 302 F Supp 581, *affd* (CA5) 421 F2d 147.

Ninth Circuit—*Kadwell* v. *United States* (1963, CA9 Nev) 315 F2d 667; *United States* v. *Thomas* (1969, CA9 Cal) 415 F2d 1216.

Dist Col Circuit—*Poole* v. *United States* (1957) 102 App DC 71, 250 F2d 396; *Gearhart* v. *United States* (1959) 106 App DC 270, 272 F2d 499.

[4] A thorough reading of the brief filed by the Government in the Court of Appeals deletes *even the remotest suggestion* of prejudice were these plea[s] to be withdrawn. The Government's brief in the Court of Appeals was 20 pages in length and in nowise was "possible prejudice to the Government" even suggested.

IV.

BREVITY OF THIS PETITION

In that §58(1)(2) directs that Petition for Rehearing "must briefly and distinctly" state grounds for rehearing we shall not prolong this petition.

This court is well aware that over 90% of all federal criminal litigation terminates in guilty pleas. This Court has never articulated a standard (or even a suggested procedure) to give direction to the several Federal Courts as to the standard to be applied when LONG PRIOR to sentencing an accused seeks to vacate a guilty plea and stand trial. That, is exactly what occurred in the case at bar. The petitioners, in writing and long prior to sentencing, sought leave to withdraw their guilty pleas "and have a trial".

Was a trial really too much to ask of the District Court? Or of the Court of Appeals?

A court stands between an accused and a prison sentence for a reason. The reason is the accused is entitled to a trial. That is exactly what the petitioners in this case were denied.

V.

CONCLUSION

Tomas Rodriguez and Angel Manuel Santana, petitioners herein, respectfully urge this court to reconsider their petition for certiorari. Each petitioner had already served a portion of their sentence during the pendency of these proceedings. Their humble request is to be

granted a trial. We respectfully urge the Justices of this court to reconsider and grant the Petition for Certiorari in this case.

Respectfully submitted,

Tomas Rodriguez and Angel Manuel Santana, Petitioners
By their attorneys,
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BLEED THROUGH

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CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION FOR REHEARING

Thomas P. Durkin, Esq., a member of this Court verifies that this petition is presented in good faith and not for any delay.

This Petition for Rehearing is brief and restricted as per the requirements of Rule 58(2) and the grounds for seeking reconsideration have been succinctly set forth in the foregoing Petition for Rehearing.

/s/ *Thomas P. Durkin, Esq.*
THOMAS P. DURKIN, ESQ.

SUBSCRIBED and SWORN to
before me this 29th day
of May, 1976.

/s/ *A. J. Petrando*
Notary Public